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IN THE

SUPREME COURT OF THE UNITED STATES

No. 90

AARON E. HENRY,
Petitioner,

vs.

THOMAS H. PEARSON,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSISSIPPI

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RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO SUPREME COURT OF MISSISSIPPI

We respectfully submit that the petition should be denied because—

1) The rights, privileges or immunities under the Constitution of the United States which petitioner seeks to have reviewed were not specially set up or claimed in the state courts; or

2) If the right, privilege or immunity not to be subjected to a libel action except under rules which accord with the holding of this court in *New York Times* v. *Sullivan,* 11 L. Ed. 686, was specially set up or claimed in the state court, petitioner was not denied such right, privilege or immunity because (a) Mississippi's rules of law accord with the holding in *Times* v. *Sullivan,* and (b) this action was determined in the state courts as required by rules approved in *Times* v. *Sullivan.*

STATEMENT OF THE CASE

This is a libel action which was brought by respondent against petitioner in the Circuit Court of Coahoma County, Mississippi, on April 25, 1962. In his declaration respondent, who was County Prosecuting Attorney for Coahoma County, charged that petitioner, on the 6th day of March, 1962, maliciously prepared, composed and published a libelous letter to Mr. Norwood, Deputy Sheriff of Bolivar County, Mississippi, which contained a malicious libel against respondent, and which was thereafter read by the addressee and divers other persons, and that petitioner, also on the 6th day of March, 1962, maliciously prepared, composed and published false, defamatory and libelous statements concerning respondent in his official capacity as County Prosecuting Attorney of Coahoma County by deliberately communicating the same to the United Press International News Bureau, at Jackson, Mississippi, and the Associated Press, at Jackson, Mississippi, with the express intent and for the sole purpose that the same be published, republished, communicated and circulated by such news agencies to their subscribers.

Respondent further charged in his declaration that the false, defamatory and libelous statements communicated to such news agencies were communicated and circulated by such news agencies to their subscribers on March 6 and 7, 1962, and actually published in a number of Mississippi newspapers on March 7, 1962, including the one published in respondent's and petitioner's home town of Clarksdale, Mississippi.

Petitioner, on July 2, 1962, filed his answer to the declaration. In it, he admitted writing the letter to Mr Norwood but denied that it was false, defamatory or libel-

ous, or maliciously prepared. He denied all averments touching the statements to the news agencies.

Petitioner's answer contained no plea of privilege or fair comment.

With the pleadings as thus described, the action came on for trial on July 19, 1962. Respondent thereupon introduced evidence to the following effect:

On the afternoon of March 3, 1962, a warrant was issued by a Justice of the Peace in Shelby, Bolivar County, Mississippi, for the arrest of petitioner on a disorderly conduct charge (R. 61, 62, 64). It was sent to Clarksdale, Coahoma County, Mississippi, where petitioner resides, for execution (R. 62, 64).

Petitioner was arrested later that afternoon by Ben Collins, Clarksdale's Chief of Police, pursuant to the directions of the warrant, and taken to the Clarksdale City Jail (R. 71, 72). The Bolivar County authorities were notified of the arrest and requested to send for the prisoner (R. 72).

In the meantime, W. S. Kincade, Mayor of Clarksdale (R. 90), had learned of the calls from Shelby to Clarksdale about the incident and had left word at the police station for Collins to telephone him when he came in (R. 73, 83, 92). Collins did so (R. 83, 92), and in their conversation told Mr. Kincade of Henry's arrest (R. 83, 84, 92). Mr. Kincade thereupon determined to go to the police station to find out what it was all about (R. 84, 90, 92).

By the time Mr. Kincade arrived at the police station, Eilert, the complaining witness, was there, and so Kincade promptly took Eilert into Collins' office and questioned him (R. 90, 93). As a result of the interrogation Kincade concluded that such offense as had been committed, if any, was not a breach of a city ordinance, but he could come to no

conclusion about whether the offense, if one had been committed, had taken place in Coahoma County or Bolivar County (R. 93). (A look at a map will show that Clarksdale and Shelby are but approximately twenty miles apart and that the dividing line between the two counties is nearly equidistant from both towns.) Accordingly he directed Collins to telephone respondent, the County Prosecuting Attorney of Coahoma County, to come to the police station and inquire into the matter (R. 73, 90, 93, 94).

When respondent arrived at the city jail, present were Mr. Collins, the Chief of Police; Mr. Kincade, the Mayor; and Sterling Eilert (R. 124, 125), and respondent began his investigation by talking with Eilert. After hearing what Eilert had to say, respondent decided that whatever statements he took should be recorded on his tape recorder and accordingly he went to his office and obtained his tape recorder (R. 125). He then took statements from Eilert, Clifford Smith, an employee of petitioner; Noelle Henry, the wife of petitioner; and petitioner himself (R. 125). All were recorded on tape (R. 125).

After talking to those above listed, respondent came to the conclusion that such criminal offense as had been committed, if any had been committed, had not been committed in Coahoma County, and so appellee closed his interview and left the city jail (R. 126). Petitioner was then taken to the Bolivar County jail (R. 64), where he remained until his release was arranged the following morning (R. 39).

On March 6, two days after his release, petitioner wrote the letter to Mr. Norwood in which he stated that he had filed a complaint with the Department of Justice charging that "the charge under which I was arrested was born in the minds of the County Attorney and the Chief of Police"

of Clarksdale, and in which he charged that his arrest was the result of a "diabolical plot" between respondent and Ben Collins (R. 41). The envelope in which it was mailed shows that it was mailed from Clarksdale on March 7, 1962, at 4:00 P.M. (R. 42).

Also on March 6, petitioner had two telephone conversations with Mr. Van H. Savell, of the Associated Press, who had called petitioner to discuss the details of an earlier story about his arrest (R. 99). Petitioner had been out at the time but later returned the call (R. 99). In that conversation petitioner told Savell that he was going to file a complaint with the Department of Justice (R. 100). Around 8:00 o'clock of that evening, petitioner called Savell to tell him he had filed his complaint with the Department of Justice and that he wanted to read it to him (R. 100). He did so twice while Savell was taking notes as to its contents, and then the two had a further discussion (R. 100). Afterwards, Savell devised a message from his notes and wired it to New Orleans where it was rewritten into the story which appeared in the Vicksburg and the Biloxi-Gulfport newspapers. In it, petitioner charged that his arrest "was an attempt to discredit him" and "a diabolical plot cooked up" by respondent and Ben Collins.

Also on March 6, petitioner called the Jackson office of the United Press International (R. 104). He wanted to talk to Mr. Herbers, manager of the office, but Herbers was out (R. 104), and so he talked to Mr. Lloyd B. Jeffers, who works under Herbers (R. 103, 104, 105). In their conversation petitioner told Jeffers that he had filed a complaint with the Department of Justice about his arrest and that he had a statement for release (R. 104), and then read the statement to Jeffers (R. 105). Jeffers took it down as he dictated it (R. 106) and then wrote and sent out the story which was published in the Clarksdale, Greenville, Corinth and

Meridian newspapers (R. 111, 112). It included a statement which petitioner had made over the telephone to Jeffers that his arrest had resulted from "a diabolical plot cooked up" by respondent and Collins (R. 110).

The Clarksdale newspaper in which petitioner's statements appeared (R. 116, 116½) has a circulation of about 6,000 (R. 116), concentrated mainly in Coahoma County and the surrounding counties of Quitman, Tunica and Bolivar (R. 116).

Petitioner knew when he called the Associated Press and United Press International that both were engaged in the business of gathering and disseminating news stories (R. 43). In fact, both organizations had carried stories originating with petitioner prior to March 6, 1962 (R. 43). The charge that his arrest was "a diabolical plot cooked up" by the County Attorney of Coahoma County (Respondent) and the Clarksdale Chief of Police (Ben Collins) was petitioner's own words (R. 101, 102). They were quoted from the statement read by petitioner over the telephone (R. 112).

Respondent is a native of Clarksdale (R. 127), grew up there (R. 127), and attended its public schools (R. 127). He graduated from the University of Mississippi Law School in 1951 (R. 127), served as County Prosecuting Attorney of Coahoma County from 1952 to 1956 (R. 127), was defeated for reelection in 1955 (R. 127), was again elected to the office in 1959 (R. 158). At the time of the trial, he expected to offer for reelection in 1963 (R. 128). He has a private law business in addition to his public duties (R. 128) and much of his clientele is colored (R. 128).

Respondent, at the time of the trial, was 32 years of age, married, the father of four children (R. 128, 129).

Petitioner's charges are false. No one has framed him. No one has "cooked up" any plot, diabolical or otherwise, to have him arrested on a morals charge (R. 74, 124). Nassar, the deputy sheriff of Bolivar County who made the arrest, had never seen Eilert before Eilert approached him in Shelby to complain about what he said had happened in the Star Chief automobile between Clarksdale and Shelby (R. 59). Collins had never seen Eilert until after he had arrested appellant and placed him in jail (R. 75). Respondent had never seen Eilert prior to the time he came to the city hall to question petitioner (R. 125). Collins knew nothing about the events in Shelby until the message came over the radio that a warrant had been issued there for the arrest of petitioner (R. 69, 70). In fact, Collins knew only that petitioner was charged with disorderly conduct when he arrested him (R. 72). The first contact which Collins had with respondent about the matter was when he called respondent to come to the city jail pursuant to the directions of Mr. Kincade (R. 73, 74). The first respondent knew of the affair was gathered from the call to come to the city jail (R. 125). Neither had discussed the matter with the other prior to that time (R. 74, 75, 125).

At the conclusion of respondent's proof, petitioner moved the court for a directed verdict on the grounds, among others:

At the conclusion of respondent's proof, petitioner moved the court for a directed verdict on the grounds, among others:

> That to render a verdict for (respondent) on the testimony and evidence would deny (petitioner) the right of free speech, as guaranteed by the First Amendment of the Constitution of the United States; and
>
> That to render a verdict for (respondent) on the testimony and evidence would deprive (petitioner) of

his rights, under due process of law, under the Fourteenth Amendment of the Constitution of the United States.

The motion was denied.

Petitioner thereupon introduced his evidence. It included his own testimony, on direct examination, that he believed that respondent had harassed him (R. 161) and that, when he wrote the letter to Mr. Norwood and gave the statements to the news agencies, he "felt that some answer to this charge (the charge made against him by Eilert) on my part was necessary. . . . I felt that some answer was necessary." (R. 161). On cross-examination, he reiterated that "I thought it was necessary to give some answer to the charge." (R. 165).

Although petitioner admitted that he hasn't a shred of evidence that respondent had something to do with his arrest, he maintained from the witness chair that respondent had tried to frame him.

Q. Well, I will ask you right now, do you tell this jury, or do you not, that Mr. Pearson—leaving out the word "diabolical"—tried to frame you at any time? (R. 163).

A. I will say in my opinion, he did (R. 163).

Q. Do you say right now that Mr. Pearson tried to frame you? (R. 164).

A. I say I believe he did (R. 164).

After both sides had concluded the presentation of testimony, and after both sides had rested, petitioner moved the court that "he be allowed to amend his (answer) in order to interpose a plea of fair comment." (R. 173). The trial court overruled the motion, observing: "It appearing that both sides had rested when the motion was made, it is overruled."

The jury found for respondent and fixed his damages at $25,000.00 (R. 174).

Petitioner thereafter moved the court for a new trial on the grounds that the verdict of the jury deprived him of his right of free speech as secured by the First Amendment to the Constitution of the United States and that the amount thereof was so grossly excessive as to deprive him of his property contrary to the due process clause of the Fourteenth Amendment to the Constitution of the United States (R. 178). The motion was overruled (R. 179).

Petitioner prosecuted an appeal to the Supreme Court of Mississippi from the judgment entered in response to the finding of the jury and in his Assignment of Errors charged that the trial court has erred in overruling his motion for a directed verdict made at the close of respondent's case, in overruling his motion to amend his answer so as to allege the defense of qualified privilege by reason of "fair comment," and in overruling his motion for a new trial.

The appeal was set for hearing before the Supreme Court of Mississippi on Monday, October 7, 1963, and was argued before that court on that day.

On December 16, 1963, the judgment of the trial court was affirmed by the Supreme Court of Mississippi. Its opinion appears in 158 So.2d 695.

Petitioner filed a Suggestion of Error with the Supreme Court of Mississippi wherein he suggested that the court had erred in its decision of December 16, 1963, by refusing to reduce the size of the verdict and because "actions under the gulise of libel which encroach upon freedom of speech and impair rights guaranteed by the Fourteenth Amendment of the United States Constitution must be nullified by an appellate court." It was overruled.

THE WRIT SHOULD NOT BE ISSUED FOR ANY OF THE REASONS ADVANCED BECAUSE THE RIGHT, PRIVILEGE OR IMMUNITY DEPENDED UPON FOR SUPPORT WERE NOT SPECIALLY SET UP OR CLAIMED

Jurisdiction to review the judgment of the Supreme Court of Mississippi in this case exists only with respect to a right, privilege or immunity specially set up or claimed by petitioners under the Constitution of the United States. *28 U.S.C., #1257 (3).*

Four reasons have been advanced by petitioner for the issuance of the writ prayed for. Each fails because of the specific provisions of the statute.

Petitioner's first claim is that the judgment is in conflict with the principles enunciated in *New York Times* v. *Sullivan,* 11 L. Ed. 686, wherein this court stated that:

> "The constitutional guarantees require, we think, a federal rule that prohibits a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with 'actual malice'—that is, with knowledge that it was false or with reckless disregard of whether it was false or not."

which means, as we understand the opinion, that in a libel suit brought by a public official because of a statement defaming him with respect to his official conduct, the defense of qualified privilege is available to defendant, and in such a case it is encumbent upon the plaintiff, if defendant interposes the defense of qualified privilege, to prove (a) that the statement was false and (b) that it was published with knowledge of its falsity or with reckless disregard of whether it was false or not.

But petitioner did not claim qualified privilege under the Constitution of the United States. The right, privilege or immunity set up or claimed by him under the Constitution of the United States (done at an improper time and in an improper manner) was that of absolute privilege. His claim was that of absolute immunity from suit by a public official for defamation relating to his official conduct, regardless of the falsity of the defamatory statement and regardless of whether it had been published with "actual malice."

The next reason advanced by petitioner for the issuance of the writ consists of an argument that petitioner's statements were not libelous because petitioner is a Negro engaged in civil rights activities. But the Constitution of the United States does not extend a right, privilege or immunity from libel laws to Negroes engaged in civil rights activities and no such claim was ever specially set up in the state courts.

Petitioner's third reason for the issuance of the writ is essentially a claim of immunity from suit for libel in the state courts of Mississippi. We restrict our response to such claim by pointing to the fact that no such immunity can be found in the Constitution of the United States and that no such claim was ever specially set up in the state courts.

The last reason advanced by petitioner for the issuance of the writ resolves itself into a claim that this is not a private libel action but a state device to suppress criticism of public officials. No such claim was ever specially set up in the state courts and there is not a scintilla of evidence which can be cited in support of such a contention.

MISSISSIPPI'S RULES OF LAW ACCORD WITH HOLDING IN TIMES V. SULLIVAN

The main thrust of petitioner's argument is that the rules which govern actions of libel in Mississippi conflict with the holding of this court in *New York Times* v. *Sullivan*, 11 L. Ed. 2d 686. But petitioner is wrong in his contention. The state's rules are the same as those enunciated by this court in that case.

In Mississippi, criticism of a public or quasi-public official which relate to his public actions, even though they be libelous per se, are qualifiedly or conditionally privileged. *Krebs* v. *McNeal*, 222 Miss. 560, 76 So.2d 693; *Edmonds* v. *Delta Democrat Publishing Co.*, 230 Miss. 583, 93 So.2d 171.

In Mississippi, when the defendant in a libel action is entitled to the defense of qualified privilege, e.g., when a public official sues someone for libel on account of libelous statements made about his official conduct,

> The plaintiff has no cause of action if the statements were made in good faith and without malice;
>
> The truth or falsity of the statements is not involved so long as there is no bad faith or malice;
>
> Malice will not be inferred even though the statements are libelous per se;
>
> It will be presumed that the statements were made in good faith;
>
> Malice and bad faith must be proved by plaintiff;
>
> The falsity of the statements must be proved by plaintiff.

See *Railway Co.* v. *Brooks*, 69 Miss. 158, 13 So. 847; *Louisiana Oil Corporation* v. *Renno*, 173 Miss. 609, 157 So. 705; *Kroger Grocery & Baking Co.* v. *Harpole*, 175 Miss.

227, 166 So. 335; *Scott-Burr Stores Corporation* v. *Edgar*, 181 Miss. 486, 177 So. 766; *Reliance Mfg. Co.* v. *Graham*, 181 Miss. 549, 179 So. 341; *Tipps Tool Co.* v. *Hobfield*, 218 Miss. 670, 67 So.2d 609; *Krebs* v. *McNeal*, 222 Miss. 560, 76 So.2d 693; *Killebrew* v. *Jackson City Lines*, 225 Miss. 84, 82 So.2d 648.

In the very words of this court, Mississippi rules prohibit a public official from recovering damages for a defamatory falsehood relating to his official conduct unless he proves that the statement was made with "actual malice"—that is, with knowledge that it was false or with reckless disregard of whether it was false or not.

THE ACTION WAS DETERMINED IN THE STATE COURT AS REQUIRED BY RULES APPROVED IN TIMES V. SULLIVAN

Petitioner apparently labors under two misconceptions of the opinion of the Supreme Court of Mississippi: (1) that that court inferred malice from the fact that his statements are libelous per se, and (2) that that court held that truth was his only defense.

The state court did not infer malice from the fact that petitioner's statements were libelous per se, although it could have done so without offense to what was said in *Sullivan*. Remember that it is the practice of many jurisdictions, including, according to the annotation in *51 A.L.R. (2d)*, which begins at page 552, that of Mississippi and the United States, that privilege and fair comment are regarded as affirmative defenses which must ordinarily be specially pleaded in order to be available, and there was no such defense interposed in this case. True, at the conclusion of respondent's testimony, a motion for a directed verdict

grounded on a claim of absolute privilege was interposed, but no one can doubt that it was properly overruled. Nor can there be doubt about the propriety of the trial court's refusal to permit the pleading of an affirmative defense after all of the evidence was in and the case closed. Hence, the case which the Supreme Court of Mississippi had before it was one wherein petitioner had waived whatever rights were available to him under a plea of qualified privilege, to be decided without reference to the particular rules which come into play only when the plea of privilege is available to a defendant and has been interposed.

But as we have said, the state court did not infer malice from the fact that petitioner's statements were libelous per se. It held "that malice was actually established in this case." And it is apparent from the quoted definition of malice which followed that statement that it did so on the basis of proof which showed that the statements were false and that petitioner made the outrageous charges without a scintilla of evidence on which to base them. It showed further that petitioner was prompted to make the statements because respondent had presumed to do his duty on those occasions when petitioner had fallen afoul of the law; as if he was above the law and not subject to prosecution. It discloses an unwillingness to disavow his calumnies, even though he has nothing with which to support them. In short, the proof not only showed that petitioner defamed respondent recklessly without knowing or caring whether his charges were true, simply because he thought it was necessary to give some answer to the charge against him, but it also showed that he did so out of spite and ill will and with a considered intention to injure respondent.

Truth was not petitioner's only defense to the action. Every defense available to a defendant in a Mississippi libel

action who has the right of recourse to a plea of qualified privilege, was available to petitioner in this case. Specifically, he was entitled to the rules which declare that there was no cause of action against him if his statements were made in good faith and without malice, that malice could not be inferred from the publication of the statements, even though they were libelous per se, that the court should presume that the statements were made by him in good faith, that respondent had the burden of proving malice, and that respondent had the burden of proving the falsity of the statements. The question of the truth or falsity of the statements would not have entered the case without proof by respondent that petitioner was actuated by bad faith and malice, as to which respondent had the burden of proof.

The fact of the matter is that the case was tried as if petitioner had interposed a plea of qualified privilege. Respondent charged in his declaration that petitioner's statements were published maliciously and in bad faith, and that they were false. Respondent assumed the burden of proving such malice, bad faith and falsity. He met that burden with competent proof, much of it from petitioner himself. There was no substantial evidence in contradiction thereof.

With malice, bad faith and falsity established by proof without susbstantial contradiction, any defense of qualified privilege was negated. Such would have been the result in any jurisdiction. The same result follows from what was said in *New York Times* v. *Sullivan*.

CONCLUSION

It is therefore respectfully submitted that this case is not a proper one for review by certiorari in this court, and that the petition for writ of certiorari should be denied.

Dated January ....., 1965.

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CERTIFICATE OF SERVICE

I certify that a copy of the above brief was mailed to each of counsel for petitioner, at his usual address, postage prepaid, on January ....., 1965.

.....

/s/ W. O. LUCKETT
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